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IN THE

Supreme Court of the United States

October Term, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, Deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

PETITION FOR REHEARING.

RUSSELL C. MACFALL,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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ETHEL ADELAIDE FIELD,

Respondent.

PETITION FOR REHEARING.

The respondent, Ethel Adelaide Field, presents this, her petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. The appeal herein was argued before this Court on November 12th and 13th, 1940.

2. On December 9th, 1940, this Court rendered its decision in favor of the petitioners and against the respondent, reversing the decree of the Circuit Court of Appeals for the Third Circuit and affirming the decree of the District Court.

3. The respondent seeks a rehearing of this cause upon the following grounds:

(a) The opinion of the Court states that:

> "It is inadmissible that there should be one rule of state law for litigants in the state courts

> and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

The effect of the Court's decision will be to bring about just that situation which is sought to be avoided and will create to the opposite extreme the lack of uniformity which existed prior to the decisions of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202. Litigants in the State courts will be able to obtain in the State's appellate courts a review upon the merits of lower State court decisions construing a local statute, with the possibility that the appellate courts will refuse to follow as unsound the lower court construction, as the opinion of this Court duly pointed out. On the other hand, litigants in the Federal courts will be unable to obtain such a review of the lower State court decisions. The decision creates a possible situation wherein a litigant, favored by a lower State court decision which is based upon such doubtful reasoning that a reversal by the appellate court is probable, will, when possible, bring his suit in the Federal courts where the unpersuasive decision must be followed. Thus the effect of the decision of this Court, if permitted to stand, is to create a different rule for litigants in the Federal courts. It is respectfully submitted that the desired uniformity among State and Federal courts would be more fully achieved by recognizing in the Federal courts, while sitting as State courts in diversity of citizenship cases, powers equal to and not subordinate to those of the State courts. It has been said, in 53 Harvard Law Review 880, at page 882, in a commentary upon the decision of the court below in this suit: "Although the holding

of the principal cases may make possible a situation wherein a federal rule may prevail for a time in the same territory as a different state rule, any conflict will be dispelled when the highest state court passes on the point."

(b) This Court in stating that future disapproval, by the Court of Errors and Appeals, of the Court of Chancery decisions was merely a matter of conjecture, may have overlooked that the ultimate approval of such decisions by the State's highest court is equally a matter of conjecture. Although at first glance it appears that the Federal courts should not be required to guess the ultimate treatment of the question by the State's highest court, it is submitted that until the highest State court has spoken in any case involving local law, all lower courts to which the question is presented must attempt to decide the question upon all available persuasive authority assisted by the application of sound logic and fundamental principles. Conjecture gives way to probability where the reasoning and authority of the lower court decisions are persuasive, but probability bows to mere conjecture where the lower court decisions are required to be followed regardless of their inherent soundness.

(c) It is submitted that neither in the briefs nor on the argument was the Court reminded of the coordinate powers of the Federal courts of appeal where sitting in review of a judgment involving a question of local law which has not been finally settled by the State courts. In the case of *Wichita Royalty Co.* v. *City National Bank of Wichita Falls,* 306 U. S. 103, at page 107, this Court said:

> "* * *, the court below correctly stated that by reason of the removal it had been substituted for

> the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court."

If this statement is applicable, then the Federal appellate courts are charged with the duty of applying the New Jersey law as the Court of Errors and Appeals would have declared and applied it in an action in the State courts and, in the absence of any applicable decision by that court, it is submitted that the Federal courts should share the existent power of the State's courts to consider all available authority upon the merits and to differ, if necessary, with the Court of Chancery.

(d) It is submitted that the facts of the instant suit differ from the cases of *West* v. *American Telephone & Telegraph Co.* and *Six Companies of California* v. *Joint Highway District,* both decided by this Court simultaneously with the instant suit, in that while in those two cases the applicable State law had been authoritatively declared by the highest State court in which a decision could be had, the question of State law involved in this appeal has not been passed upon by any appellate court of New Jersey. While the distinction between the decisions of a trial court and those of an appellate court may appear to be somewhat tenuous when viewed objectively, it is nevertheless something more substantial to the litigant who has been deprived of any review upon the merits of the legal questions involved. The effect of the decision of this Court, if permitted to stand, will

be to deprive the respondent of the review, on the merits, of the Chancery decisions, to which she would have been entitled had the litigation been instituted in the State courts. (1937 Revised Statutes of New Jersey, 2:29-117.*) This again serves to indicate that the decision results in a different rule for litigants in the Federal courts.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted.

Dated: New York, December 30, 1940.

Respectfully submitted,

RUSSELL C. MACFALL,
Counsel for Respondent.

Certificate of Counsel.

I, RUSSELL C. MACFALL, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RUSSELL C. MACFALL,
Counsel for Respondent.

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* 2:29-117. Persons entitled; orders or decrees appealable. All persons aggrieved by any order or decree of the court of chancery may appeal therefrom, or any part thereof, to the court of errors and appeals.

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1940.

Fidelity Union Trust Company and Minton H. Twinch, as Executors of the last Will and Testament of Edith M. Peck, Deceased, Petitioners, *vs.* Ethel Adelaide Field.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In 1935, Edith M. Peck caused the title of a savings bank account standing in her name to be transferred on the records of the bank to "Edith M. Peck, in trust for Ethel Adelaide Field". Miss Peck retained exclusive control over the account, with sole right of withdrawal and right of revocation, and gave no further notice of the existence of a trust.

This suit was brought by Ethel Adelaide Field against the bank and the executors of Miss Peck to obtain a decree that the credit balance of the account belonged to the complainant. The executors denied the validity of the trust and claimed title. The District Court found in favor of the executors upon the ground that under the law of New Jersey there was no trust and no valid gift. The Circuit Court of Appeals reversed the judgment, holding that under a state statute the complainant was entitled to recover. In so ruling, the court declined to follow contrary decisions of the Chancery Court of New Jersey. 108 F. (2d) 521. In view of the importance of the question thus presented, we granted certiorari. 309 U. S. 652.

In 1932, the legislature of New Jersey passed four statutes, in similar terms and approved on the same date, dealing with trust deposits in banks. The text of one of these provisions is set forth in the margin.[1] Prior to these statutes, it had been the law of New

[1] Chapter 40, New Jersey Sessions Laws of 1932, Section 1, is as follows:

"1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice

Jersey that a mere savings bank deposit made by a decedent in his own name as trustee for another, over which the decedent exercised complete control during his life, was insufficient to establish a gift *inter vivos* or to create a trust as against the decedent's legal representatives. *Nicklas* v. *Parker*, 69 N. J. Eq. 743, affirmed, 71 N. J. Eq. 777; *Johnson* v. *Savings Investment and Trust Company*, 107 N. J. Eq. 547; affirmed, 110 N. J. Eq. 466.

The statutes of 1932 came before the Chancery Court of New Jersey in 1936, in two cases decided independently by two Vice-Chancellors, *Thatcher* v. *Trenton Trust Company*, 119 N. J. Eq. 408, and *Travers* v. *Reid*, 119 N. J. Eq. 416. In the *Thatcher* case it appeared that the decedent, at the time of her death in 1934, had two bank balances standing to her credit "in trust for Clifford Thatcher", the complainant. The bill was dismissed. The court found that there were no facts, beyond the mere opening of the account in that manner, "in any way tending to prove the declaration of a trust". The court examined the legislation of 1932, which it was argued had changed the law of the State, and after considering possible purposes of the legislature and analyzing the language employed, which was deemed to be "confused" and "difficult to comprehend", the court decided that the legislation was inoperative to change the law applicable to the facts before the court. In the *Travers* case, the decedent had changed his bank account to his name "in trust for Joseph Jennings", a minor. In a suit by the decedent's executrix to recover the money, a motion by the minor's guardian to strike the bill for want of equity and upon the ground that the fund was the property of the ward or held in trust for him, was denied. After stating the law as it stood before the statutes of 1932, the court concluded that they had not been effective to alter the previous legal requirements of a gift *inter vivos* or a valid trust. These cases were not reviewed by the Court of Errors

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of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided*, that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee". See Revised Statutes of New Jersey, 1937, 17: 9-4.

and Appeals of New Jersey and, so far as appears, that court has not expressed an opinion upon the construction and effect of the statutory provisions.[2]

The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound "by the pronouncements of other state courts" but might conclude that "the decision does not truly express the state law". The court held that the statute of 1932 was "clearly constitutional and unambiguous" and that "contrary decisions" of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals* v. *Hale*, 4 How. 37, 54; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78), but it is still the duty of the federal courts, where the state law supplies the rule of decision,[3] to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed

[2] In Cutts v. Najdrowski, 123 N. J. Eq. 481 (1938), the Court of Errors and Appeals held that the validity of a trust of choses in action created by a transaction *inter vivos* was determined by the law of the place where the transaction occurred, in that case New York. In Trust Company of New Jersey v. Farawell, 127 N. J. Eq. 45 (1940), the Court of Errors and Appeals held that, where the decedent had made a deposit in her name in trust for her daughters, and the savings bank book was thereafter in the possession of the daughters and withdrawals were made upon the signatures of the mother and the daughters and were used for maintaining properties devised to the daughters by the mother shortly after the account was opened, there was sufficient evidence to show a presently effective trust. The court said that such a trust depends essentially upon the same principles "that activate a gift *inter vivos*, comprising donative intent, delivery of the subject-matter to the extent that delivery is possible or can be indicated, and the abdication by the donor of dominion over the subject-matter. *Id.*, p. 48. In these cases, the court did not refer to the statutes of 1932 or to the Chancery decisions cited in the above text".

[3] Judiciary Act of 1789, Sec. 34; R. S. 721, 28 U. S. C. 725.

by a federal court in deciding a state question. We have declared that principle in *West* v. *American Telephone and Telegraph Co.*, Nos. 44 and 45, decided this day. It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation. Equity decrees in New Jersey are entered by the Chancellor, who constitutes the Court of Chancery,[4] upon the advice of the Vice-Chancellors,[5] and these decrees, like the judgments of the Supreme Court of New Jersey are subject to review only by the Court of Errors and Appeals.[6] We have held that the decision of the Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State's highest court (*Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 100, 101; *Erie Railroad Co.* v. *Duplak*, 286 U. S. 440, 444), and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.

While, of course, the decisions of the Court of Chancery are not binding on the Court of Errors and Appeals, a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court "except for cogent and important reasons". *Ramsey* v. *Hutchinson*, 117 N. J. L. 222, 223. It appears that ordinarily the decisions of the Court of

[4] N. J. Constitution, Art. VI, Sec. 4.

[5] See Gregory v. Gregory, 67 N. J. Eq. 7, 10, 11; In re Appointment of Vice-Chancellors, 105 N. J. Eq. 759.

[6] Revised Statutes of New Jersey, 2: 27-350, 2: 29-117.

Chancery, if they have not been disapproved, are treated as binding in later cases in chancery (*Philadelphia & Camden Ferry Co.* v. *Johnson*, 94 N. J. Eq., 296, 297), but there is always, as respondent urges, the possibility that a particular decision of the Court of Chancery will not be followed by the Supreme Court (see *Flagg* v. *Johansen*, 124 N. J. L. 456, 461) or even by the Court of Chancery itself. See *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 461. It is the function of the court of last resort to resolve such conflicts as may be created by decisions of the lower courts and except in rare instances that function is performed and the law is settled accordingly. Here, however, there is no conflict of decision. Whether there ever will be, or the Court of Errors and Appeals will disapprove the rulings in the *Thatcher* and *Travers* cases, is merely a matter of conjecture. See *West* v. *American Telephone and Telegraph Co., supra.* At the present time the *Thatcher* and *Travers* cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning.

The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.